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Supreme Court, U.S.
FILED
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No. 03-898

In the
Supreme Court of the United States

MIGUEL G. ORTIZ-VELEZ and THE MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA, CONJUGAL PARTNERSHIP RIVERA-NAZARIO, YASIRA RIVERA-NAZARIO and ZAHIRA RIVERA-NAZARIO
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

On December 22, 2003, Petitioner Mayor of Sabana Grande, Mr. Miguel Ortiz-Velez, in his personal capacity and in his capacity as Mayor, filed a petition for a writ of certiorari to review the decision of the First Circuit Court of Appeals, affirming the denial of qualified immunity and affirming municipal liability. On March 4, 2004, Respondent former-municipal employee and his family members filed their response to the petition and forty-three municipalities of Puerto Rico joined the proceedings by filing an amici curiae brief in support of Petitioners. The latter was opposed by respondents on March 31, 2004 and the response distributed for the Court's April 2, 2004 conference. On April 5, 2004, this Honorable Court denied the petition.

Since the filing of the petition for writ of certiorari, the First Circuit has issued two more opinions that shed light on their qualified immunity holding in the case below, Mihos v. Swift, 358 F.3d 91 (1st Cir. Feb 13, 2004) and Rivera-Jimenez v. Pierluisi, 2004 U.S. App. LEXIS 5773 (1st Cir. Mar. 29, 2004). These two cases highlight the extent to which the First Circuit has deviated from this Court's clear directives by once again inserting bad intent or motive into the qualified immunity analysis to preclude resolution of the immunity issue prior to trial. By relying on the mere assertion that a controversy of fact remains as to Defendants' actual intent to preclude entitlement to qualified immunity, the First Circuit fails to take into account the context within which the Supreme Court has developed the qualified immunity doctrine, namely, that not all controversies of material fact preclude qualified immunity and appellate review of its denial. See Behrens v. Pelletier, 516 U.S. 299, 313 (1996) ("Denial of summary judgment often includes a determination that there are controverted issues of material

fact and Johnson surely does not mean that every such denial of summary judgment is nonappealable"). As is apparent from the two cases discussed below, the First Circuit is not so sure of what Johnson v. Jones, 515 US 304 (1995) means and less so what this Court's decision in Behrens sought to clarify. Because these subsequent decisions have a substantial and controlling effect on the validity of the First Circuit's qualified immunity analysis, we respectfully request that this Honorable Court reconsider its denial of the petition for writ of certiorari.

DISCUSSION

A. MIHOS V. SWIFT

In Mihos v. Swift, Plaintiff was a voting member of the Massachusetts Turnpike Authority who the then-acting Governor removed from the board after the Plaintiff voted against a proposed toll increase. The district court denied the Defendant's motion to dismiss on the basis of qualified immunity and a panel for the First Circuit affirmed. In response to the Defendant's assertion that an official's state of mind is irrelevant to the defense of qualified immunity, the Court stated:

> This argument, along with citations to Harlow, is often made in First Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in Harlow changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, Harlow does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the first step of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged.

The panel further acknowledged that the Supreme Court in

Crawford-El v. Britton, 523 US 574, 589 (1998) explained "how Harlow removed the subjective elements from the third step of the qualified immunity inquiry so that 'bare allegations' that the defendant maliciously or knowingly violated plaintiff's constitutional rights would no longer suffice to overcome a qualified immunity defense." However, the Mihos panel went on to distinguish the import of this holding where the question is whether the Plaintiff stated a constitutional claim since procedurally, the case was before the Court on a motion to dismiss.

Although Petitioners believe that the Mihos panel decision did nothing to clarify how a showing of unconstitutional motive in the first prong of the qualified immunity analysis forecloses the assertion of the defense altogether, a subsequent First Circuit decision published just last month obfuscates even further the standards which the First Circuit applies in the First Amendment context.

B. RIVERA-JIMENEZ V. PIERLUISI

While Mihos affirms the denial of qualified immunity at the motion to dismiss stage where the Plaintiff makes out a constitutional claim, the First Circuit panel in Rivera-Jimenez v. Pierluisi applies a qualified immunity analysis that conforms even less to Supreme Court precedent, reaching the same result as Mihos, that immunity is precluded at the summary judgment stage due to a material issue of fact as to Defendant's motive in carrying out the alleged act.

Plaintiffs in Rivera-Jimenez were state investigation agents for the Department of Justice for the Commonwealth of Puerto Rico who claimed retaliatory harassment in the workplace because, allegedly, the results of their investigations indicated corruption within their own agency. Though this decision signals great dangers for government-

employer Defendants in the First Circuit for many reasons, we highlight just two for our present purposes.

As the petitioners briefed earlier, the First Circuit appears to be creating sub-categories of the qualified immunity analyses where the claim alleged is retaliation for First Amendment activity. We inferred this from the conflicting standards applied by the Circuit. Alarming, though not surprising, the Rivera-Jimenez panel declares:

> The standard for showing an adverse employment action is lower in the First Amendment retaliation context than it is in other contexts (such as Title VII), see Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000) , and the Supreme Court has indicated that even relatively minor events might give rise to liability. See Rutan v. Republican Party of Ill., 497 U.S. 62, 75-76 & n.8, 497 U.S. 62 (1990) ; see also Coszalter v. City of Salem, 320 F.3d 968, 974-77 (9th Cir. 2003) ("To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind."); Power, 226 F.3d at 820 ("Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable..."); but see Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000) (holding that some employment actions are not actionable even though they have the effect of chilling the exercise of free speech).

Contrary to Mihos, Rivera-Jimenez applies the subjective element of Defendants' state of mind beyond the first prong of the qualified immunity analysis and further declares that the unresolved issue as to Defendants' motives precludes not only qualified immunity but divests the appellate court of jurisdiction to even consider the defense. The First Circuit panel states:

> As to the third prong of the qualified immunity determination, the reasonableness inquiry is also a legal determination, although it may entail preliminary factual determinations if there are disputed material facts (which should be left to a jury). In the instant appeal, the lower court determined that questions remained as to the issue of defendants' motive which precluded entry of summary judgment on qualified immunity grounds. Since pre-trial qualified immunity decisions are immediately appealable as collateral orders when the immunity claim presents a legal issue that can be decided without considering the correctness of the plaintiff's version of the facts, we cannot exercise jurisdiction over this part of the qualified immunity analysis. Doing so would entail making a determination of material facts. (internal citations omitted)

Petitioners respectfully believe that parties, attorneys and District Court judges in the First Circuit no longer have any clear guidelines as to the appropriate analysis that will be applied on a pre-trial assertion of qualified immunity. The First Circuit's recent decisions in Mihos and Rivera-Jimenez demonstrate very clearly that a defendant asserting qualified immunity will not prevail on such assertion unless she can also prove that she is entitled to prevail on the merits. The consequences for defendants within the First Circuit are dire in that the merging of the merits of Plaintiff's claim and the merits of Defendant's immunity defense renders superfluous the immunity doctrine, and the policy consideration which underpin it, altogether.

CONCLUSION

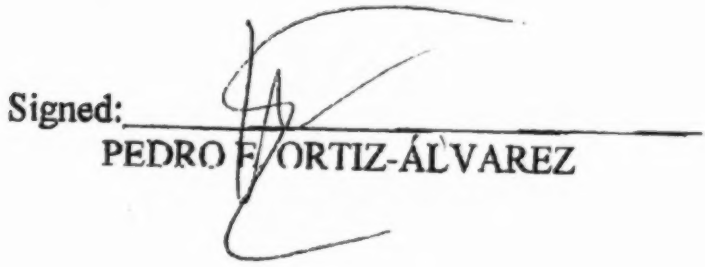
Petitioners are mindful that this Honorable Court restricts petitions for rehearing of an order to deny a petition for writ of certiorari to those circumstances in which intervening events have a substantial or controlling effect on the

disposition of the petition. Petitioners respectfully believe that the First Circuit's insistence on inserting bad motive into the immunity analysis, going so far as making its absence an essential element of a successful immunity claim, affects the substantial rights of petitioners and affirms the fears of the forty-three amici municipalities that qualified immunity has been converted into a doctrine of unqualified liability. We respectfully request that this Honorable Court grant the petition for writ of certiorari in order to review the First Circuit's motive-based application of this Court's qualified immunity doctrine.

PEDRO E. ORTIZ-ÁLVAREZ

Attorney for Petitioners

I, PEDRO E. ORTIZ-ÁLVAREZ, hereby certify on this 30th day of April 2004 that this petition is restricted to intervening circumstances of substantial or controlling effect and is presented in good faith and not for delay.



Signed: _____

PEDRO E. ORTIZ-ÁLVAREZ